SUPREME COURT, U. S.
DEC 1
JOHN F. DAV

Nos. 797, 804, 808, and 809

In the Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN COMMERCIAL LINES, INC., ET AL., APPELLANTS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

THE AMERICAN WATERWAYS OPERATORS, INC., APPELLANT

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

These are appeals by the Interstate Commerce Commission (No. 809) and certain barge (Nos. 797 and 808)

and trucking (No. 804) interests from the decision of a three-judge district court (J.S. No. 797, App. A, B) which set aside the Commission's decision in Investigation and Suspension Docket No. 8038, *Ingot Molds, Pa. to Steelton, Ky.*, 326 I.C.C. 77. The Commission proceeding was an investigation of a reduction in the rates charged by the Louisville and Nashville Railroad and the Pennsylvania Railroad for the carriage of ingot molds over a particular Pennsylvania-Kentucky route. The railroads compete against a combined barge and truck service for this traffic, and certain barge lines protested the reduction.

Although the reduced rate is above the railroads' out-of-pocket costs incident to handling the traffic, the protestants claimed that it was illegal because it was below the fully distributed costs of the barge and truck lines for their similar service. The question is governed by Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3), which provides that "rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy * * *." That policy requires that the Interstate Commerce Act be "so administered as to recognize and preserve the inherent advantages of each [mode of transportation]." 49 U.S.C. preceding Section 1. The Commission concluded that to determine which mode of transportation possesses the "inherent advantage," it must compare the fully distributed costs of each mode. It then held that the mode with the lowest fully distributed costs has the inherent advantage and that, to

preserve it, competing modes should be prohibited from offering reduced rates which are below this level. Hence, it found that the railroads' reduced rates were unlawful even though—since they covered out-of-pocket costs—they were compensatory.

The railroads then brought the instant action for review of the Commission's order in the district court. The United States, a statutory defendant, filed an answer admitting the allegations of the complaint and thereafter participated as a plaintiff. Forty-eight railroads intervened in support of the plaintiff railroads; various barge lines, motor carriers, and their trade associations intervened in support of the Commission. The court below set aside and enjoined the Commission's order, and remanded the matter for reconsideration (J.S. App. 22–23). It held that the Commission had failed to state a rational basis to support its adoption of comparative fully distributed costs as the test of inherent advantage among competing modes of transportation (J.S. App. 7); and that when Congress adopted Section 15a(3) in 1958, it expressed a clear intent that compensatory rates—*i.e.*, rates above the out-of-pocket costs of one mode but below the fully distributed costs of another—should normally be allowed notwithstanding their impact on competing modes (J.S. App. 14–21).

The appeals present a major issue reserved by this Court in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744, 760–761—whether out-of-pocket costs, fully distributed costs, or "some different measure" should be the criterion for determining which mode of transporta-

tion has the inherent advantage under Section 15a(3) and the National Transportation Policy.[1] The obvious importance of the question to the future regulation of inter-modal competition under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy suggests the appropriateness of plenary consideration. We therefore urge this Court to note probable jurisdiction.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.

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[1] Although the district court's first ground of decision does not reach this question, it is necessarily presented because the second ground—that the Commission misinterpreted or misapplied the relevant statutory provisions (J.S. App. 14)—prohibits the Commission, except in extraordinary situations, from using fully distributed costs as the criterion for determining inherent advantage between competing modes.

U.S. GOVERNMENT PRINTING OFFICE: 1967